International Ship Repair & Marine Services, Inc. ***and*** **Tampa Metal Trades Council, AFL–CIO.**
Cases 12–CA–18879 and 12–RC–08105

September 23, 1999

DECISION, ORDER, AND DIRECTION OF SECOND ELECTION

BY CHAIRMAN TRUESDALE AND MEMBERS LIEBMAN AND BRAME

On February 17, 1999, Administrative Law Judge David L. Evans issued the attached decision. The Respondent filed exceptions, a supporting brief, and an answering brief. The General Counsel filed cross-exceptions, a supporting brief, and an answering brief. The Respondent filed a reply brief to the General Counsel's answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order as modified and set forth in full below.[2]

ORDER

The National Labor Relations Board orders that the Respondent, International Ship Repair & Marine Services, Inc., Tampa, Florida, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Assigning employees more onerous working conditions because of their union activity.

(b) Suspending employees because of their union activity.

(c) Laying off employees because of their union activity.

(d) Refusing to recall employees because of their union activity.

(e) Threatening employees with plant closure and relocation if they choose to be represented by the Union.

(f) Threatening employees with unspecified reprisals because they have engaged in union activities.

(g) Threatening employees with discharge because they have engaged in union activities.

(h) Warning employees that it would be futile for them to choose to be represented by the Union.

(i) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Arthur Davenport full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make Arthur Davenport whole for any loss of earnings or other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of this decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the assignment of more onerous working conditions to Arthur Davenport, as well as the unlawful layoff, suspension, and refusal to recall him, and within 3 days thereafter notify Davenport in writing that this has been done and that the assignment of more onerous working conditions, layoff, suspension, and refusal to recall him will not be used against him in any way.

(d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in Tampa, Florida, copies of the attached notice marked "Appendix."[3] Copies of the notice, on forms provided by the Regional Director for Region 12, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has

[1] The Respondent and the General Counsel have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F. 2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings. In addition, some of the Respondent's exceptions imply that the judge's rulings, findings, and conclusions demonstrate bias and prejudice. On careful examination of the judge's decision and the entire record, we are satisfied that the Respondent's contentions are without merit.

In adopting the judge's findings regarding the Respondent's selection of employee Arthur Davenport for layoff, Member Brame finds it unnecessary to rely on the judge's conclusion that Foreman Tyrone Parker's testimony was internally inconsistent; rather, he finds it sufficient to rely on the inconsistency of Parker's testimony in this regard with that of Supervisor Jonathan Pollack.

[2] The judge inadvertently omitted from his recommended Order and notice reference to all the 8(a)(3) violations he found. We shall modify the judge's recommended Order and notice to conform to the violations found. We shall also modify the judge's recommended Order in accordance with *Excel Container*, 325 NLRB 17 (1997).

[3] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since May 17, 1997.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification by a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the election held on June 30, 1997, in Case 12–RC–08105 is set aside and that the case is remanded to the Regional Director for Region 12 to conduct a new election when he deems the circumstances permit the free choice of a bargaining representative.

[Direction of Second Election omitted from publication.]

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
> To form, join, or assist any union
> To bargain collectively through representatives of their own choice
> To act together for other mutual aid or protection
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT assign employees more onerous working conditions because of their union activity.

WE WILL NOT suspend employees because of their union activity.

WE WILL NOT lay off employees because of their union activity.

WE WILL NOT refuse to recall employees because of their union activity.

WE WILL NOT threaten employees with plant closure and relocation if they choose to be represented by the union.

WE WILL NOT threaten employees with unspecified reprisals because they engaged in union activities.

WE WILL NOT threaten employees with discharge because they have engaged in union activities.

WE WILL NOT warn employees that it would be futile for them to choose to be represented by the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Arthur Davenport full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights and privileges previously enjoyed.

WE WILL make Arthur Davenport whole for any loss of earnings and other benefits resulting from the discrimination against him, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the assignment of more onerous working conditions to Arthur Davenport, as well as the unlawful suspension, layoff, and refusal to recall him, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the suspension, layoff, refusal to recall, and assignment of more onerous working conditions will not be used against him in any way.

INTERNATIONAL SHIP REPAIR & MARINE SERVICES, INC.

Dallas Manuel II, Esq., for the General Counsel.
Peter W. Zinober and *Shane T. Munoz, Esqs.*, for the Respondent.
Joseph Egan Jr., Esq., for the Charging Party.

DECISION

I. STATEMENT OF THE CASE

DAVID L. EVANS, Administrative Law Judge. This case under the National Labor Relations Act (the Act) was tried before me on eight dates from March 5 through June 15, 1998. On May 19, 1997,[1] in Board Case 12–RC–08105, Tampa Metal Trades Council, AFL–CIO (the Union) filed a petition for election and certification as the collective-bargaining representative of the production and maintenance employees of International Ship Repair & Marine Services, Inc. (the Respondent or the Employer). A Board election was conducted on June 30. The tally of ballots showed that 103 employees had voted against the Union, 50 had voted for the Union, and 1 ballot was challenged. On July 7, the Union filed objections to alleged employer conduct that had affected the results of the election (the objections). Also on July 7, the Union filed an unfair labor practice charge in Case 12–CA–18879. On December 31, the Regional Director issued a complaint and notice of hearing (the complaint), and by order dated January 21, 1998, the Regional Director issued an order consolidating the cases for purposes of hearing.

The unfair labor practice allegations include threats of discharge, plant removal, and unspecified reprisals, all in violation of Section 8(a)(1) of the Act. All such threats were allegedly directed to one employee, Arthur Davenport. It is further alleged that, in violation of Section 8(a)(3), the Respondent discriminated against Davenport by the following conduct: (1) on or about May 18, and thereafter, imposing on Davenport more

[1] All dates mentioned are in 1997, unless otherwise indicated.

onerous working conditions; (2) on June 14, suspending Davenport for a period of 2 days,[2] and (3) on June 20, selecting Davenport for layoff and thereafter refusing to recall him. The complaint further alleges that, in violation of Section 8(a)(1), the Respondent conducted surveillance, including photographic surveillance, of its employees while they engaged in protected activities. Finally, the complaint alleges that, in violation of Section 8(a)(1), the Respondent also conducted surveillance of employees who were approaching the area where the June 30 Board election was being conducted. The objections track the unfair labor practice allegations, and they add the allegations that the Respondent also interfered with the Board election by: (1) assisting employees who campaigned against the Union, and (2) promising and granting benefits in order to discourage employees from voting for the Union.

On the testimony and exhibits entered at trial,[3] and on my observations of the demeanor of the witnesses,[4] and after consideration of the briefs that have been filed,[5] I make the following

FINDINGS OF FACT[6]

II. JURISDICTION

The Respondent admits that during the calendar year preceding the issuance of the complaint it was engaged in the operation of a shipyard at Tampa, Florida, where it performed repairs and conversions of ships. In conducting those business operations, the Respondent purchased and received at its Tampa facility goods and materials valued in excess of $50,000 directly from suppliers located at points outside Florida. Therefore, at all times material here the Respondent was an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. As the Respondent further admits, at all material times the Union was a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES AND THE ALLEGED OBJECTIONABLE CONDUCT

A. The Supervisory Status of Pollack

The Respondent is owned by brothers George and Carl Lorton. William Russell is the Respondent's president; reporting to Russell are David Sessums, vice president in charge of operations, and Michael McMillan, vice president in charge of production. Immediately reporting to McMillan is Michael Lackman, the general superintendent. The operations under McMillan and Lackman are divided into departments which include welding, pipefitting, and other such crafts. The Respondent usually employs from 150 to 200 production and maintenance employees, all of whom report to McMillan and Lackman through various departmental supervisors. Some departments are headed by superintendents; others are headed by foremen. (No supervisor is classified as a general foreman.)

The department about which most of the evidence is concerned is the operations department.[7] Employees in the operations department are classified as crane operators, riggers, forklift operators, tug boat operators, deck hands, mechanics, forklift operators, and yard cleanup personnel. The head of the operations department is Foreman Tyrone Parker. At the time of the events in question, one of Parker's leadmen in the operations department was Jonathan Pollack. Whether Pollack was a supervisor within Section 2(11) of the Act is an issue in this case. I find that he was.[8]

On May 17 the Respondent transferred alleged discriminatee Davenport from its welding department, where he had worked as a welder, to its operations department, where he began working as a rigger. (This transfer is not alleged to have been a violation of the Act.) The idea for the transfer came not from Davenport himself or any admitted supervisor; the idea came from Pollack.

In their work, welders do some rigging; for example, they may rig their own welding equipment to be lifted by a crane from a dock onto a ship. At time of trial Pollack was no longer employed by the Respondent; however, he was called by the Respondent as a witness. On direct examination Pollack testified that he had seen Davenport doing some rigging while working in his capacity as a welder. According to Pollack:

> We needed help at the time as far as riggers went, and he [Davenport] seemed to be a very good guy. You know, [I] knew what he was doing in the rigging, so I spoke to him about coming to work for us and he said yes, you know, he wouldn't mind doing it. And at that time I spoke to his [then] immediate supervisor which, I believe, was [Welding Department Foreman] Ray Overstreet, and Ray said that there would be no problem. And then I spoke with my supervisor, Tyrone Parker, to get the okay. And he said that would be fine, we could use him. So we transferred him to our department.

Parker testified consistently with Pollack on this point. That is, Parker relied entirely on Pollack's recommendation, rather than interviewing Davenport or testing his abilities as a rigger before the transfer was effectuated.

The Respondent's upper level supervision and its personnel department are notified of interdepartmental transfers, or other personnel actions, on certain forms, each of which is entitled "Status/Payroll Change Report." Pollack, not Parker, signed the Status/Payroll Change Report that documented Davenport's transfer for upper management. Parker testified that he told Pollack to sign Davenport's transfer report because Parker had been too busy at the time. Pollack did not offer such testimony (although Pollack did offer such testimony about other status/payroll change reports that he had signed, as discussed

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[2] Actually, the complaint alleges that Davenport was "laid off," not suspended, on June 14. The fact is, however, that the Respondent's June 14 conduct was more akin to that of a suspension of an employee rather than to a layoff of an employee.

[3] Certain passages of the transcript have been electronically reproduced. Some corrections to punctuation have been entered. Where I quote a witness who restarts an answer, *and that restarting is meaningless*, I sometimes eliminate redundant words; *e.g.*, "Doe said, he mentioned that" becomes "Doe mentioned that" In my quotations of the exhibits, I sometimes simply correct *meaningless* grammatical errors rather than use "[sic]."

[4] Credibility resolutions are based on the demeanor of the witnesses and any other factors that I may mention.

[5] The General Counsel and the Respondent filed briefs; the Union did not.

[6] On brief, the General Counsel moves for admission of a copy of the third amended charge which was filed by the Union on October 31. The motion is unopposed, and I receive the copy as GC Exh. 1(y).

[7] Although the subject department was called other things by other witnesses, this is the departmental name that was used by Nancy DeVega, the assistant to the Respondent's personnel director.

[8] There is no contention that another of Parker's leadmen, one Jimmy Hayes, is also a supervisor.

infra). Pollack was not a clerical employee; if he had been acting as such, he would have signed Parker's name, not his own, to the documentation of Davenport's transfer. Because of this factor, and the factor of the lack of corroboration on the point by Pollack, I discredit Parker's testimony that he directed Pollack to sign the paperwork that was necessary to transfer Davenport from the position of a welder in the welding department to the position of rigger in the operations department.

Status/payroll change reports are also used to effectuate layoffs. Each such form concludes with spaces designated for "Authorized by" and "Approved by." The Respondent conducted layoffs on both May 30 and June 20. The General Counsel placed in evidence five status/payroll change reports for operations department employees who were laid off on May 30, or June 20, or both. These were: (1) alleged discriminatee Davenport (June 20); (2 and 3) Carlos Ordonez (May 30 and June 20); (3) Otis Nix (June 20); and (4 and 5) Ray Hamilton (May 30 and June 20). For each of these layoffs, Pollack signed the relevant status/payroll change report in the "Authorized by" space. The Respondent's vice president, Sessums, signed each of these layoff reports in the space designated for "Approved by." Both Pollack and Parker testified that Pollack signed the forms only because Parker told Pollack to do so because Parker was too busy. Again, Pollack was not a clerical employee, and Pollack signed his name, not Parker's. I do not believe the testimonies of Pollack and Parker that Pollack signed the forms only because Parker was too busy; I find that Pollack signed the forms because he selected the employees for layoff. (Pollack's selection of Davenport for the June 20 layoff is detailed infra where I consider the 8(a)(3) allegations.)

The Respondent utilizes two forms to effectuate the hiring of new employees. One form is entitled "Hire In and Reporting Form." The boilerplate of the form concludes "Foreman to sign off and return this form to personnel department." The General Counsel placed in evidence such forms that were utilized by the Respondent for the hirings of operations department employees William Hart and Carlos Ordonez; the forms were dated January 15 and May 19, respectively; both were signed by Pollack. The other form that the Respondent uses in the hiring processes is one entitled "Employee Approval Form." That form concludes with spaces for "Employee Signature" and "Supervisor Approval." The General Counsel placed in evidence such forms that were utilized by the Respondent for the hirings of operations department employees Raymond Hamilton and David Anderson; the forms were dated February 8 and May 19, respectively; both were signed by Pollack. When Pollack was called by the Respondent and asked about the hiring processes in the operations department, he testified: "I will go up and get the application and I will interview. And then I speak to Tyrone [Parker], and I tell him about the interview, and I show him the application, and he ultimately says okay or not." When Pollack was on cross-examination, the General Counsel asked him specifically about the hiring of Hart:

> Q. What questions did Mr. Parker ask you?
>
> A. What I thought of him.
>
> Q. And what were your thoughts?
>
> A. Well, based on his application and his interview, I thought he was a good guy for the job.
>
> Q. And then Mr. Parker didn't ask you any more questions, correct?
>
> A. No, not really.
>
> Q. Based on your recommendation, he agreed to hire him, correct?
>
> A. Yes.

When Parker was called as a witness by the Respondent, he did not dispute this testimony. Parker, again, testified that Pollack signed the hiring forms only because he had told Pollack to do so. I do not believe that testimony either.

Section 2(11) of the Act defines "supervisor" as:

> any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

Section 2(11) is couched in the alternative; therefore, a presentation of proof that an individual possessed any one of the listed indicia requires the conclusion that that individual was a supervisor under the Act.

According to Pollack's own account, with which Parker did not differ, he initiated the idea that Davenport be transferred from the classification of welder in the welding department to the classification of rigger in the operations department. Then Pollack went to the foreman of the welding department (Overstreet) and recommended that he cut his complement of welders by one and transfer Davenport to the operations department. Pollack also went to the foreman of the operations department (Parker) and recommended that he increase his complement of riggers by one. Without further investigating the matter, both foremen accepted Pollack's recommendations and the transfer was thereby effectuated. The Respondent makes a distinction between "loans" and "transfers" of employees between departments. Transfers are supposedly a permanent matter, while loans are supposedly not. Transfers require notification to upper management and the personnel office; loans do not. In this case, upper management was notified of the transfer of Davenport, not by admitted Supervisor Parker, but by Pollack. Upper management accepted Pollack's signature as the necessary documentation to accomplish the transfer, and upper management and the personnel office thereafter considered Davenport to be a permanent part of the operations department.[9] That is, Pollack actually transferred Davenport from one classification in one department to another classification in another department. Even if Pollack did not himself transfer Davenport, it is more than perfectly certain that Pollack effectively recommended such action because his recommendation was accepted without independent investigation by either Parker, Overstreet, upper management, or the personnel office. The General Counsel has therefore proved that Pollack transferred Davenport, or that Pollack at least effectively recommended the transfer of Davenport, from the classification of welder in the welding department to the classification of rigger in the operations department. Accordingly, without more I would find that Pollack was a supervisor under the Act. There is, however, more.

[9] Indeed, as will be seen, the Respondent contends that Davenport was not recalled as a welder from the June 20 layoff because its personnel records listed him as an operations department employee.

Pollack reviewed applications and interviewed applicants. When he did so, Parker accepted his recommendations without further interviews or investigations. On some occasions, upper management and the personnel office were then notified that an employee had been hired by status/payroll change reports that were completed and signed by Pollack, not Parker.[10] Within the terms of the Act, therefore, Pollack effectively recommended the hiring of employees. Finally, as noted above, Pollack selected employees for layoffs and upper management accepted his documentation that he had done so. I therefore find and conclude that, at all relevant times, Pollack was a supervisor within Section 2(11) of the Act.

B. Alleged Discrimination Against Davenport

1. The General Counsel's evidence and contentions about Davenport

a. Background and notice of union activities

Davenport is a member of the International Brotherhood of Boilermakers Union and a graduate of that organization's 4-year welders' apprenticeship program (which is where he got his rigging experience that Pollack admired). Davenport is well versed in all phases of welding that are utilized by the Respondent. Davenport was originally employed by the Respondent in January 1993 as a ship fitter,[11] a job that also requires substantial welding skills. He then worked for 3 months when, according to the Respondent's records, he was laid off for "lack of work" (according to the Respondent's records); a month later Davenport was called back to work, but 1 month after that he was again laid off for "lack of work." Davenport was hired again as a new employee in January 1996, again as a ship fitter, but he quit 3 months later. Finally, on December 23, 1996, Davenport was again hired as a new employee, that time as a welder in the Respondent's welding department. Davenport worked as a welder until on or about May 18 when, as mentioned, the Respondent transferred him to the position of rigger in the operations department. Davenport thereafter continued in the Respondent's employ until the layoff of June 20. It is undisputed that, during all periods of his employment with the Respondent, Davenport was an excellent worker.[12] It is further undisputed that, throughout Davenport's periods of employment, the Respondent's supervisors knew that he was a member of the Boilermakers Union. (In fact, Davenport admitted on cross-examination that during his previous periods of employment with the Respondent, he and Lackman had an agreement that, when he could find more lucrative work through the Boilermakers Union, he would be treated as being laid off for "lack of work.") The Respondent, however, has never recognized any labor organization as the representative of any of its employees.

Gary Meredith is the recording secretary of the Union. Meredith testified that on May 15 several of the Respondent's employees met with him and formed an organizing committee; those employees elected Davenport as the committee's chairman. On May 16, further according to Meredith, he watched as Jimmy Connatser, president of the Union, composed, signed, and faxed a letter to owner George Lorton. Connatser's letter, which was undated, stated that the Respondent's production and maintenance employees were engaged in an organizational attempt. The letter concludes: "[T]he below-listed employees wish to be identified as members of the organizing committee." Then follow the names of 22 of the Respondent's employees; Davenport's name was the first listed. The list is not in alphabetical order; Meredith testified that Davenport's name was listed first because the members of the organizing committee had elected him as chairman, but there is no indication of Davenport's chairmanship in the letter. Although Connatser's letter to the Respondent is undated, the General Counsel seeks a finding that it was sent by Connatser, and that it was received by the Respondent, on May 16. The General Counsel seeks such findings to support his contention that the Respondent had specific knowledge of Davenport's lead in the organizational attempt before it began unlawfully imposing onerous working conditions upon Davenport on May 17 or 18. The Respondent does not deny receipt of Connatser's faxed letter, but it would stipulate only that it received it "on or before May 21."

Davenport testified that, also on May 16, he began wearing at work three prounion buttons on his clothing. A large button said, "Boilermakers Organizing Committee." A smaller button had the Boilermakers' Union's full name on it. A second smaller button said, "Don't Whine, Organize." Davenport testified: "I wore them every day that I was employed at International Ship, up until the day I was laid off." (On cross-examination, Davenport admitted that, during his prior periods of employment with the Respondent, he had always worn a single Boilermakers Union sticker on his hardhat.)

b. The May 18, et seq., alleged onerous assignments to Davenport

The General Counsel contends that, after he was transferred to the operations department, Davenport was subjected to more onerous assignments by being isolated in two different ways: (1) by being assigned to an isolated work area, and (2) by being assigned to work hours that inhibited his contact with other employees.

Although it was not until May 20 that Pollack put through the papers to document Davenport's transfer to the operations department, Davenport began working there on May 18 (or possibly May 17). Davenport confirmed Pollack's testimony that he agreed to the transfer.[13] Davenport testified that Pollack showed him how to operate the forklift; after successfully performing some operations with the forklift, Pollack told him that he would certify that Davenport could operate the forklift safely. Davenport further testified that on May 18 or 19 Pollack assigned him to work on the Respondent's barge crane and that he thereafter worked on the barge crane "about 70 percent" of the time; the remainder of his time he did rigging on ships or operated a forklift.

[10] Again, I discredit the testimonies of Pollack and Parker that Pollack completed and signed the forms only because Parker was too busy. In addition to the factors mentioned above, Parker gave his testimony in this regard in answer to leading questions. Indeed, Parker was so eager to follow the leading that he once identified the hire-in form of employee Ordonez as the hire-in form of employee Nix.

[11] The record, p. 1060, L. 10, is corrected to change "Critter" to "fitter."

[12] In a March 3, 1996 status/payroll change report, General Superintendent Lackman recommended an upgrade for Davenport; Lackman wrote that Davenport: "Is a combination man—burn, fit, weld, [does] air arc, mig, [and] tig [welding]. Welds boiler tubes (certified). The type of person we need. Does not miss work. A+ in all."

[13] Rigging is easier, cleaner work than welding, and the pay is the same for top journeymen, as was Davenport. Again, the transfer of Davenport to rigging is not alleged to be a violation of the Act. All acts of alleged discrimination against Davenport occurred after the transfer.

A barge crane is a crane that is situated on a barge, rather than on a ship or on the land. The barge crane works only in the port; the barge crane is pushed around the port by one of the Respondent's two tugboats. As a rigger on the barge crane, Davenport rigged loads that were to be transferred between the barge and a land location or between the barge and ships.[14] When a tugboat is in operation, it is staffed by a captain and a deck hand (or "line-handler"). Davenport testified that, before he was assigned to the barge crane, the deck hand (who was also classified as a "rigger") did any rigging that the barge crane required. After he was assigned to the barge crane, Davenport testified, the deck hand would do nothing but sit and watch as he performed whatever rigging that the barge crane's cargo required. (As will be seen, the deck hand who continued to be assigned to the tugboat after Davenport was assigned to the barge crane was one David Anderson; the theory of the General Counsel's case is, inter alia, that the Respondent unlawfully passed over Anderson to lay off Davenport.)

The normal work hours for the Respondent's day-shift employees are from 7:30 a.m. until 4 p.m., and those were the hours that Davenport had usually worked when he was classified as a welder. Davenport testified that after being transferred to the operations department as a rigger he was assigned to start work at either 4 or 6 a.m., and his quitting times would be from 4:30 p.m. and thereafter. Davenport testified: "And when the rest of the employees were going home after a normal time, I was working extended hours. I was asked to work over, stay over for fifteen minutes, stay over for an hour." When working on the barge crane, Davenport further testified, he often could not go to the lunch room, as did other employees and as he had done as a welder; instead, he had to eat his lunches on the barge or tug boat that was pushing it. Davenport testified that his having different starting, quitting and lunchtimes greatly diminished his opportunities for contacts with other employees. Davenport testified that when he was assigned to the barge crane, he had opportunity for contact only with the operator of the crane. Riggers on land or on ships had opportunity for contact with many other employees as they worked or took breaks.

c. The alleged threats to Davenport before the June 20 layoff

Davenport testified that early on May 18, while he was working in the operations department, a spill of paint thinner occurred. Davenport went to the office of the Respondent's safety director, James Martin (an admitted supervisor). According to Davenport:

> I had went into his office to report a paint spill. The conversation went me speaking, "Jim, I come in here to let you know there was a paint spill on the dock out there close to the water."
>
> And at that time, he had looked up at my organizing button, and he said "Well, what are we trying to organize out here, a party?"
>
> And I said, "Jim, I can't discuss this at this time."
>
> I said, "I can discuss it with you at lunch time or when I get off work."
>
> He said, "Well, what are we organizing, a party?"
>
> And I said, "Yes, Jim, we're organizing a labor party, but I can't discuss it at this time with you."
>
> And he said, "Well, yeah, we can, tell me about it, tell me about the Union."
>
> And I said, "No, Jim, I can't discuss it at this time. I could be fired for discussing the Union activities during my normal work hours."
>
> And he said, "Well, you don't have to worry about it, the only one that's going to fire you in here is me, and I'm not going to fire you. Let me hear about it."
>
> I said, still insisted that I didn't want to discuss it at the time and couldn't discuss it. Then he had made the statement to me as, "Well, Art, what makes you think the Union's even going to come in here? You know, all George and Carl [Lorton, the owners] have to do is lock that gate out there, and the Union won't be able to come in. They'll just go to the Bahamas, and you won't even have to worry about going through all of this stuff."
>
> My reply was: "I don't want to discuss it. I'll discuss it at lunch time or after work."

Based on this testimony by Davenport, the complaint, at paragraph 8, alleges that by Martin's conduct the Respondent threatened employees with plant closure and removal in violation of Section 8(a)(1).[15] During the presentation of the Respondent's case, Martin denied this threat that Davenport attributed to him.

Davenport further testified that, later on May 18, he had an encounter with Mark Branson, the Respondent's superintendent of the welding department; according to Davenport:

> This was at lunch time, and it was at the wash trough inside the main shop area where all the employees wash up for lunch. And he [Branson] had noticed me there and he says, "Art, look, what makes you think the Union is going to be allowed in here?"
>
> And he said, "Well, look, they're not going to come in here; the Union's not going to make it. They're [the members of management are] going to close the doors, they're going to lock it up. They're going to back the floating drydocks up to the dock there. Everything in this shop can be put on the dry-docks and float it down to the Bahamas and be in business down there. Are you going to go down there and work in the Bahamas for International Ship at a substandard wage?" My response was no.

Based on this testimony by Davenport, the complaint, at paragraph 9, alleges that by Branson's conduct the Respondent threatened its employees with plant closure and removal in violation of Section 8(a)(1). During the presentation of the Respondent's case, Branson denied this threat that Davenport attributed to him.

Davenport further testified that on May 20 he went to the deck of a ship to retrieve his personal welding equipment; there he met Kirk Suchier, superintendent of the Respondent's shipfitting department. According to Davenport:

> When I had retrieved my bucket, Kirk Suchier had walked up to me on the deck and he flipped my Boilermakers organizing campaign button and he'd asked me,

[14] For example, if a ship was longer than a dock, and land-situated material was needed at the end of that ship that extended beyond the dock, a barge crane would lift the material from the land, move it to the end of the ship, and then lift the material onto the ship.

[15] The complaint does not further allege that by Martin's conduct the Respondent interrogated employees in violation of Sec. 8(a)(1). The matter was, however, made a subject of the Union's objections to the June 30 Board election.

"What do you expect to gain with that? All you're going to do is lose."

And I asked him, "Kirk, what do you expect me to lose?"

And he had started to say something, but he had walked off kind of mumbling under his breath, nothing that I could make out.

Based on this testimony by Davenport, the complaint, at paragraph 10, alleges that by Suchier's conduct the Respondent threatened its employees with unspecified reprisals in violation of Section 8(a)(1). Davenport further testified that after this incident Suchier would not return greetings as Suchier had previously done. Davenport testified that he once asked Suchier what he may have done to cause Suchier's incivility. Suchier replied that it was because of a "Union-Yes" button that Davenport was then wearing. During the presentation of the Respondent's case, Suchier denied ever making a comment to Davenport about "union buttons" that Davenport was wearing. Suchier further testified that he could not recall speaking with Davenport about the Union, and he testified that he could not recall if Davenport ever asked him what he had done to upset him. Suchier did not, however, deny telling Davenport that he could only "lose" if the employees selected the Union as their collective-bargaining representative.

Davenport testified that, also on May 20, he had a confrontation with Parker. According to Davenport:

Tyrone had come out of the supervisor's office and he come up to me and he said, "Art, what's this shit on your shirt right here?"

And I said, "Tyrone, we don't need to discuss this at this time."

And he said, "Well, what is this shit?"

He [reading one of the buttons] goes, "'Union Boilermakers,' you need to get out of it, Art."

I said, "Tyrone, let's not discuss this now, the first of the day. We'll talk about it lunch time."

And he said, "The Union's a piece of crap, they're no good. The best thing for you to do, Art, is to get out of the Union, to get those buttons off you and stop the campaign, because all you're going to do is upset upper management, and you're going to get fired; you're going to lose your job. You're starting a ruckus."

Based on this testimony by Davenport, the complaint, at paragraph 11(a), alleges that by Parker's conduct the Respondent threatened its employees with discharge in violation of Section 8(a)(1). At paragraph 11(b), the complaint also alleges that by the statements of Parker to Davenport the Respondent also warned its employees that their efforts to secure a collective-bargaining representative would be futile, again in violation of Section 8(a)(1). During the presentation of the Respondent's case, Parker denied these threats that Davenport attributed to him.

d. The June 14, 1997 suspension of Davenport

Davenport testified that on Thursday, June 12, Parker called him to his office and:

He [Parker] said, "Look, this isn't coming from me, this is coming from the Safety Department. Jim Martin's got the safety deal now that if you work over twenty-one days straight, you have to have two days off. And we run your name through the computer and it was flagged, but understand, this isn't from me, this is from the Safety Department, but you got to take two days off."

Davenport testified that this was the first that he had ever heard of any such safety policy (the days-off policy). Davenport worked Friday, June 13, but he took off June 14 and 15 as Parker had told him to do. It is undisputed that there was work for Davenport on June 14 and 15, and it is further undisputed that Davenport would have worked those dates but for Parker's instructions. (It is for this reason that I refer to Davenport's lost time as a suspension, rather than as a layoff, as mentioned above.)

The Respondent has computerized timeclocks which record the starting time, ending time, and total hours worked each day by each employee. For each employee, the Respondent also maintains a record entitled "Employee Calendar." Each of such calendars is a display of a full year with a square for each day. Using the timeclock records, employees in Respondent's personnel department hand-enter on the calendars the total hours worked each day by a given employee. The Respondent's production and maintenance operations continue seven days a week, as several employee Calendars that are in evidence reflect. As Davenport's employee calendar demonstrates, by June 12, the day that Parker ordered him to take 2 days off (starting June 14), he had been working for 39 consecutive days; as mentioned, Davenport also worked on June 13 which was his 40th consecutive day of working without a day off.

The General Counsel contends that the days-off policy that Parker announced to Davenport as the basis for the suspension did not actually exist. For that position, the General Counsel relies on employee calendars that reflect that other employees worked in excess of 21 days without taking any days off. The General Counsel further points out that, even when those other employees did take time off (mostly well after 21 days), they only took off 1 day, not 2 days as Davenport was required to do. The General Counsel contends that those employee calendars prove disparate treatment of Davenport and that they are evidence of unlawful discrimination against him.

As discussed infra, the Respondent contends that it adopted its days-off policy during April. The General Counsel introduced the 1997 employee calendars of 15 other employees who, through and after April, worked 21 or more consecutive days without taking 2 days off, as Davenport was required to do: (1) Erbil Engin, a crane operator in the operations department, worked 27 consecutive days from April 7 until May 4 when he took 1 day off. Engin returned to work on May 5, and he then worked another 27 consecutive days (including the May 26 Memorial Day holiday) until June 1 when he took 1 day off. Engin returned to work on June 2, and he then worked 26 consecutive days until June 28 when he took 1 day off. (2) Walter Mott, also a crane operator in the operations department, worked 28 consecutive days from April 28 until the May 26 Memorial Day holiday when he took 1 day off. Mott returned to work on May 27, and he then worked 32 consecutive days until June 28 when he took 2 days off. (3) Edward Fuller, a mechanic in the operations department, worked 26 consecutive days from May 5 to 31 when he took 2 days off. (4) Franklin Galan, a welder, worked 49 consecutive days from April 7 until May 26 (again, Memorial Day) when he took 1 day off. (5) Wilfredo Guido, a machinist, worked 75 consecutive days from February 10 until April 26 when he took 1 day off. Guido also worked 91 consecutive days from May 27 until August 26 when he took 1 day off. Guido also worked 27 consecutive

days from October 6 until November 2 when he took 1 day off. (6) Kent Misner, a welder, worked 33 consecutive days from April 7 until May 10 when he took 1 day off. (7) Jose Morales, a ship fitter, worked 33 consecutive days from April 28 until May 31 when he took 1 day off. (8) Jerome (Keith) Parker, an electrician, worked 32 consecutive days from April 21 until May 23 when he took 5 days off. Parker returned to work on May 28, and he then worked 29 consecutive days until June 21 when he took 1 day off. (9) Travis Satcher, a toolroom employee, worked 46 consecutive days from April 7 until May 24 when he took 3 days off. (10) Leford Shaw, a welder, worked 21 consecutive days from May 5 to 26 when he took 1 day off. (11) Phillip Swanson, also a welder, also worked 21 consecutive days from May 5 until May 26 when he took 1 day off. (12) Robert Vallee, also a welder, also worked 21 consecutive days from May 5 to 26 when he took 1 day off. (13) Thaddeus Williams, also a welder, worked 26 consecutive days from May 11 until June 5 when he took 3 days off. (14) John Worsham, a tool room employee, worked 26 consecutive days from April 7 until May 3 when he took 2 days off. (15) Robert Dawson, a ship fitter, worked 26 consecutive days from May 5 to 31 when he took 2 days off. The Respondent represented at trial that it keeps no records that would indicate whether these 15 employees took any of the indicated days off as a result of the days-off policy. None of the 15 employees testified, nor did any of their supervisors. Parker, who was the supervisor of Engin and Mott, testified, but none of the supervisors of the other 13 employees listed in this paragraph did.[16]

e. The June 20, 1997 selection of Davenport for layoff

At the time of the June 20 layoff, the Respondent employed three employees who were classified as riggers: Joseph Seither (who was hired on July 26, 1996), Davenport (who was hired on December 23, 1996), and David Anderson (who was hired on May 22, 1997). One J. B. Bland was an employee of the outside machinery department who had been "loaned" to the operations department during the first part of 1997; during that time, and up to June 20 when he also was laid off, Bland worked as a rigger.

According to Davenport, on June 20:

> That morning, Tyrone had talked with me, saying that they were going to have to lay off two people in the Operators Department, because work was kind of slow. And that I was the low man on the totem pole, being the newest man in the Operator's Department, that I was going to have to be laid off because I hadn't been in there but for a short time period.

Further according to Davenport, Pollack told him later in the morning that he was being laid off because he was "the newest guy into the department."

Davenport testified that at the end of the day Pollack handed him the layoff notice that Pollack had signed, as mentioned above. Davenport testified:

> After I had received my paycheck and was explained that that was a layoff slip, and Johnny then made the statement to Tyrone Parker, "See, Tyrone, I told you I'd get rid of these Union guys. I'm laying one off right now."
>
> And Tyrone, his reply was, "I have no comment for that. Johnny, you need to watch your mouth on what you're saying."

Based on this testimony by Davenport, the complaint, at paragraph 13, alleges that by Pollack's conduct the Respondent threatened its employees with discharge in violation of Section 8(a)(1). During the presentation of the Respondent's case, Pollack denied making such a threat and Parker denied ever hearing Pollack make such a threat.

The General Counsel admits that about 50 employees were laid off on June 20, but he contends that Davenport was discriminatorily, and unlawfully, selected for the layoff because he was not the least-senior employee in the operations department. As mentioned, Davenport was last rehired on December 23, 1996; records in evidence show that the following day-shift employees[17] were hired into the operations department after Davenport: (1) William Hart, a crane operator, on January 15; (2) Carlos Ordonez, a forklift operator, on May 19, and, as mentioned above, (3) Anderson, a rigger, on May 26. Ordonez, as well as Davenport, was laid off on June 20; Hart and Anderson were not. The General Counsel contends that the retention of Anderson shows disparate treatment against Davenport. (Parker testified that Hart was not laid off because crane operators are too hard to replace; the General Counsel does not contest that testimony and does not contend that the retention of Hart is evidence of discrimination against Davenport.)

Parker was first called as an adverse witness by the General Counsel. Parker was asked and he testified:

> Q. [By Mr. Manuel]: What were the determining factors that you relied upon when making your decision of which two employees would be laid off on June 20, 1997?
>
> A. I don't recall two employees. I recall Art Davenport. I remember that. I laid off two employees?
>
> Q. What is your recollection? When I asked you previously, your recollection was—
>
> A. One. Well, I was thinking at the time that you was talking about Bland. I'm not sure if he got laid off or not.

(Bland, again, was a machinist who had been on "loan" to the operations department to work as a rigger. At this point in the hearing, however, Bland had not been mentioned.) Later in his testimony Parker testified that it was McMillan told who him about the June 20 layoff, and Parker further testified: "I was told I had to get rid of two of my riggers."

As discussed infra, Parker's testimony is rife with inconsistencies. Just who Parker counted as "two of my riggers" is somewhat hard to discern. The two employees who had regularly worked as riggers who were laid off on June 20 were Davenport and Bland. As Parker himself testified, however, Bland was a member of the machinery department. That is, Bland was not a member of the operations department and he was not classified as a rigger. Again, only Davenport, Seither, and Anderson were formally classified as riggers, but neither Seither nor Anderson was laid off on June 20. Therefore, in responding to the General Counsel's questions, Parker was necessarily counting Bland as one of "two of my riggers" whom he had laid off on June 20.

[16] I find it unnecessary to consider records introduced by the General Counsel that indicate that three supervisors also worked for periods in excess of 21 days without taking a day off. (Those supervisors were Mark Branson and Ray Overstreet of the welding department and John Davidson of the boilermakers department.)

[17] As will be seen, the Respondent conducted the layoff by shifts.

After Parker gave that testimony the General Counsel reminded him that forklift operator Ordonez had also been laid off from the operations department on June 20; this, of course, meant that Parker had laid off three employees (Ordonez, Bland, and Davenport), but Parker had testified only that he had been told to lay off "two of my riggers." After being reminded about Ordonez, Parker testified that he had laid off Ordonez: "Because I had to lay off in that department also." When asked if Davenport and Ordonez were not both in the same "department," Parker replied: "No. No, the forklift operator would probably be working with Jimmy Hayes in the yard support area, clean-up and this and that." Hays, however, was the leadman in charge of yard cleanup; yard cleanup was part of the operations department under Parker.

The General Counsel further contends that the evidence separately shows that, as well as Davenport's layoff being unlawful, he was unlawfully denied recall from the June 20 layoff. According to Nancy DeVega, assistant to the Respondent's personnel manager, the Respondent began recalling employees within 1 or 2 weeks of June 20. Davenport has never been recalled from the June 20 layoff as a rigger; the Respondent did, however, once give Davenport a notice of recall as a welder.

Nathan Zeringue is the manager of the Respondent's personnel department. On October 15, Zeringue called Davenport at home. At that time, Zeringue offered Davenport recall as a welder. Davenport testified that he told Zeringue that he could report within a week, and Zeringue replied that that would be acceptable.[18] On October 17, however, Zeringue called Davenport again. According to Davenport:

> He had informed me that there was a discrepancy in material being expedited to the yard. They were having a hard time getting material, and that they were going to have a layoff in two to three days, and they didn't want me to quit my job and come back to work, and then have to get laid off two days later.
>
> [Zeringue told me to] try to hold on to that job, and that they'd call me back when they got the problem of getting the material back to the yard straightened out.

Zeringue did not call Davenport again. The General Counsel contends that the Respondent's offering of recall to Davenport, then withdrawing the offer immediately after Davenport accepted it, is further evidence of a discriminatory motive in the Respondent's actions toward him.

The General Counsel further contends that the evidence shows that, as well as unlawfully refusing to recall Davenport as a welder, the Respondent unlawfully refused to recall Davenport as a rigger. The Respondent began recalling some of the laid-off employees almost immediately. Bland was recalled on July 9, but, according to Parker's testimony, Bland did not thereafter work as a rigger (even on "loan" from the outside machinery department). After the layoff, Pollack did some of the rigging, as both Pollack and Parker testified. Crane operator William Hart, who was called as a witness by the Respondent, testified that after the layoff the Respondent hired one Frances Holland as a rigger; Parker corroborated this testimony during his cross-examination. Hart further testified that the Respondent also used employees of subcontractors as well as employees "loaned" from other departments to do the rigging. On cross-examination, Hart at first admitted that crane operations needed two "people," a crane operator and a rigger. Hart later tried to retreat from this admission, but it is clear that, except in extraordinary circumstances, a crane operator needs a rigger to function. Anderson quit on July 11; Pollack quit on September 26. According to Hart, Seither also quit in the fall of 1997. When specifically asked which employees served as riggers after Seither quit, Hart answered: "Every once in a while, we'd borrow them from machinists, whatever."

The Charging Party called as its witness Elizabeth Rebman who, from October 9 through November 3, substituted for DeVega as the assistant to Zeringue in the personnel department. Rebman testified that during the first 2 weeks of that period, the Respondent was hiring many welders and ship fitters. During the last week, however, something happened to cause the Respondent to stop hiring new employees and to terminate the work of some subcontractors. (Rebman suspected that that "something" was loss of a contract by the Respondent, but no supervisor so testified.)

2. The Respondent's evidence and contentions about Davenport

a. Background and notice of union activities

The Respondent argues that its supervisors did not have knowledge of the organizational attempt until May 20, which date would have been at least 2 days after Davenport was first assigned to work on the barge crane. The Respondent did not produce the original of Connatser's letter that Lorton received. Rather, the Respondent produced a copy of Connatser's letter that had been faxed to the Respondent's counsel from the Respondent's plant office at 8:56 a.m. on May 21. Lorton did not testify. Russell testified that either Lorton gave him the original of Connatser's letter, or someone else did. Counsel for the Respondent referred Russell to the "May 21" fax date that was on the copy that was received in evidence and asked:

> Q. [U]sing the May 21, 1997, date as a reference point, do you have any personal knowledge as to when you believe that you received the document at International Ship?
>
> A. I would imagine I received it the day before.
>
> Q. Why would you imagine that?
>
> A. Our mail doesn't come in until ten or 11:00 o'clock in the morning and inasmuch as this was faxed to your offices at 8:56 a.m., that would be before the mail had arrived that particular day so it would have probably been received the day before.

Implicit in these answers, of course, is the assumption that Connatser's letter was received in the Respondent's plant office by regular mail, as opposed to having been received by facsimile transmission. Russell did not mention receiving from Lorton (or anyone else) a letter that had been faxed from Connatser. Russell testified that he discussed Connatser's letter (however it was received) with Lorton and Vice Presidents McMillan and Sessums, but he did not discuss it with any other supervisors. On cross-examination, Russell testified that he did not know whether his first knowledge of the organizational attempt was receipt of Connatser's letter or receipt of the petition that was filed on May 19. Russell admitted that he did not know who handled Connatser's letter before he did, and he did not know whether copies were made before he saw the letter.

Neither Russell nor any other witness who was called by the Respondent denied that, beginning on May 16, Davenport be-

[18] Zeringue testified that Davenport asked for 2 weeks to report; I credit Davenport, but ultimately this makes no difference.

gan wearing as many as three prounion buttons (or stickers) at a time, as Davenport testified. No witness called by the Respondent testified that any other employee ever wore so many prounion insignia.

b. The May 18, et seq., alleged onerous assignments to Davenport

As noted, Davenport testified that after he was transferred to the operations department he was assigned to work on the barge crane "about 70 percent" of the time; the remainder of his time was spent on decks of ships or on the ground. When Pollack was called by the Respondent, Pollack testified that as a rigger Davenport spent "probably seventy percent" of his time on the decks of ships. When asked if Davenport ever worked on the barge crane, Pollack replied, "I would have to [say] yes, he probably did." Pollack testified that, both before and after Davenport was transferred to the operations department, the deck hands of the tugboats "generally" did the rigging that was required on the barge crane. When asked when Davenport's day "generally" began, Pollack testified, "Our standard start time was 7:30." When asked if there were "variations" for Davenport, Pollack replied that there were, but he was not asked to elaborate. Similar questions and answers were elicited regarding Davenport's quitting times as a rigger. Pollack was shown Davenport's employee calendar and asked if the gross hours-per-day that it reflected refreshed his recollection. Pollack answered that it did not, and he further acknowledged that Davenport could have been required to report earlier, and leave earlier, than the other employees. As noted, the Respondent keeps computerized records of employees' punch-in and punch-out times; the Respondent produced such records for other employees concerning other issues, but it produced none for Davenport's tenure in the operations department.

Parker testified that Davenport was assigned to the barge crane only for a few days, at most. Parker testified that he would have assigned Davenport to the barge crane only if the line-handler of a tug was absent or if there was an especially large or dangerous load to be rigged and a second rigger was needed.

When crane operator Hart was called by the Respondent, he testified that when Davenport worked as his rigger, Davenport usually worked on the decks of ships or at the dry dock where he would have had opportunities for contact with other employees. Just how much Hart worked with Davenport was not established on direct examination. On cross-examination, Hart testified that Davenport worked with him, on ships or the dry dock, "well, not every day, but I mean most of the days, say for a month."

c. The June 14, 1997 suspension of Davenport

An issue in this case is whether, before it decided to suspend Davenport, the Respondent had actually adopted the days-off policy that Parker described to Davenport. Martin (again, the Respondent's safety director at the time of the events in question) testified that the Respondent has a management safety committee which meets on the second and fourth Tuesdays of each month. In 1996, one Richard Murdock, a business consultant, attended these meetings. According to Martin, Murdock suggested a possible relationship between industrial accidents and overtime. Murdock did not testify, but the Respondent introduced minutes from its April 23, 1996 management safety meeting which, after listing three items of old business and five items of new business stated:

> 6. Murdock's analysis of overtime hours and the result in work and safety efficiency: General work force averaging 50–60 hrs. per wk; machinists averaging 60–65 hrs. per wk., with some supervisors averaging up to 70 hrs. per week. Suggested a cut-off point of hours worked [per] week to assist with better productivity, safety & run-away job costs.

Martin further testified that after the April 23, 1996 meeting, the Respondent's safety committee discussed the overtime and safety issues "many, many weeks and many times." Martin testified that during the following year he regularly reviewed departmental lists to note how many hours per day, and hours per week, employees were working. During some weeks, some employees worked as many as 80 hours. Martin testified that he pointed this out to other management members and: "I suggested mandating, very quickly, that these individuals that had excess overtime hours be given time off to take them out of that loop of high opportunity for accident and injury." Martin further testified that, at some point (and, again, the date of that point is in issue) the management safety committee decided: "[I]f an individual had worked twenty-one days, then it was a matter of management having to take a look at that issue and make sure they had some time off to reduce the likelihood of them becoming injured."

Martin testified that the management safety committee did not decide on an absolute rule regarding when an employee was required to take time off after having worked 21 consecutive days; rather, according to Martin, an employee's having worked 21 consecutive days was to be viewed as a "benchmark." Whether an employee was required to take off was a decision to be left to the production departments. Martin further testified that the adoption of the "benchmark" days-off policy was informal; it was never reduced to writing. Martin testified that it was "commonplace" for employees to be required to take days off pursuant to the days-off policy, but he could name no employee other than Davenport upon whom the policy was imposed.[19] Martin testified that the days-off policy was adopted "within 30 days" of April 2, the date he created a certain memorandum that listed the overtime hours of several unit employees during the first quarter of the year.

During his cross-examination, Martin was asked to be specific about when the days-off policy was adopted. Martin replied that the days-off policy was adopted at the management safety committee meeting of April 24. At another point, however, Martin acknowledged that some of the documentation that he had identified as being relied upon in the April 24 management safety committee meeting included dates in May; in fact, the documentation includes three footnote notations that certain accident information was: "Not available as of 5/15/97." When confronted with the apparent discrepancy, Martin testified: "My recollection was that it was done before that [May 15]. I know it was—we endeavored to do it as quickly as possible after the second meeting [in April]." Martin admitted that none of the Respondent's agenda minutes, before or after April 24 (including the minutes of the April 24 meeting itself), reflected that the days-off policy had ever been adopted. Finally Martin was asked and he testified:

[19] Martin did name two supervisors who were required to take time off under the days-off policy, Overstreet and Bransom, but even that testimony was hearsay because Martin also testified that he had no part in implementing the policy.

Q. So the only thing we have is your testimony today as to the approximate date that this policy was adopted?

A. I would imagine that that is a fact.

McMillan testified, but not about the days-off policy. Parker testified McMillan told him that Davenport had been "working too many days in a row," although Parker did not recall how many days that was. According to Parker: "We talked about whether to not ask him to come in on a weekend and give him a couple days rest. Mr. McMillan talked to me about my schedule for the weekend and how many riggers I would need. I had enough to cover the job, so I told him it would be all right. So, I didn't ask him [Davenport] to come in that weekend." Parker testified that the days-off policy had been in existence before McMillan spoke to him about Davenport, but he did not know for how long. Parker testified that he once announced the days-off policy to the employees in his department, but it was before Davenport had transferred there on May 17 or 18. (Neither Pollack nor Hart was asked to corroborate this testimony.) Parker did not dispute Davenport's testimony that he had told Davenport that "Jim Martin's got the safety deal now that if you work over twenty-one days straight, you have to have two days off."

On cross-examination, Parker was asked why Mott and Engin were allowed to work more than 21 days without being required to take any time off. Parker testified:

> They're [crane] operators. I talked to them about how many hours they'd worked and if they're tired. [I asked them if] they could work without any problems. At the time we were very busy. I didn't have a lot of operators and I needed them to work if they could.
>
> So, I discussed it with Jim Martin and I felt that it wasn't a hard, strenuous job. They sit in the crane and pull the levers, you know. I didn't feel there was any problem.

Parker acknowledged that he did not ask Davenport if he was tired before requiring him to take off on the weekend of June 14–15. Parker further acknowledged that Davenport was the only employee of whom he knew that was required to take time off under the days-off policy.

d. The June 20, 1997 selection of Davenport for layoff

McMillan testified that the Respondent announced a layoff of 50 employees on June 20 because a business projection mandated a layoff for the week beginning June 23. The copy of the projection upon which McMillan relied listed the Respondent's various departments and the total numbers of employees in each department who were available for work, by shifts, and it listed the numbers of employees in each department that were actually needed, again by shifts. The difference in each department was an excess that needed to be reduced in each department for each of the Respondent's two shifts. Specifically for the operations department, the projection upon which McMillan relied showed that for the week of June 23, the operations department had a total of nine employees available on the first shift, but only two were actually needed; five employees were available for the second shift, but only two were needed there also. McMillan testified that he ordered fewer layoffs than the projections called for because of the nearness of the June 30 Board election and the fear of unfair labor practice charges.

Although the projections that McMillan utilized in ordering layoffs stated the numbers of employees in each department that were needed, or not needed, they did not list the classifications in each department. Indeed, there is no evidence that, at the time that he ordered layoffs, McMillan knew how many employees there were in the different classifications of the different departments. McMillan testified that, for each production department, he told the department head the total numbers of employees who had to be laid off in that department, by shifts. McMillan testified that Parker was one such department head, and he did not testify that he told Parker anything else; specifically, McMillan did not testify that he told Parker to lay off two riggers (as Parker had testified).

As noted, Parker testified when called by the General Counsel that he was told to lay off "two of my riggers." When Parker was called by the Respondent, he flatly denied that he considered seniority when he chose employees for layoff. Parker testified that he selected Davenport over Seither for layoff because Seither was a better rigger and not because Seither was a senior employee. As noted, Anderson was hired by the Respondent on May 22, and he was also classified as a rigger. During that month before the June 20 layoff, Anderson was usually assigned to be the deck hand on a tug boat. The Respondent asked Parker why he selected Davenport for layoff rather than Anderson:

> Q. Is there a reason why you did not lay off Mr. Anderson on June 20, 1997?
>
> A. There's a couple of reasons why. He's multi-talented, plus I wasn't told to lay off anyone in that department.
>
> Q. Is that the tugboat department?
>
> A. I'm sorry, yes.

When asked what he meant by testifying that Anderson was "multi-talented," Parker testified:

> He handles the lines on a tow, so the tugboats [can move] around different areas, different barges moving stuff, he attaches the lines, hooks them up. He does maintenance on the tugboats.
>
> He has to know virtually as much as the captain does in just the fact that they're out to sea sometimes, and if anything happens to the captain, he's the next one—he's got to take control of the boat. So he can drive the boat, he's been taught how to do this. Plus he does help the barge crane. When the barge crane is moving around making different lifts, he's rigging for the operator sometimes.
>
> . . . .
>
> We had to teach him rigging, yes, at first. He knows now, but his main duty is to work with the tugboats. We have two tugs there now, and he'll swap over and work either tug. But his main function is line handler on the tugboats, not rigger. But he knows rigging and he knows the line handling aspect of it also.

When asked if Davenport had the same skills as Anderson, Parker replied, "I don't know, I never used him in that capacity, so I don't know."

According to the Respondent's records, Anderson was in the Respondent's paygrade "R6." When asked what that designation meant, the Respondent's personnel assistant (and witness) Nancy DeVega testified: "R means rigger, six is, Class six is a learner; so that means that he is a rigger, a learner-rigger learner." There is only one pay-grade lower.

I have previously concluded that Parker counted Bland (who, again, had been on loan from the machinery department) as one of "two of my riggers" that he laid off on June 20. When Parker was called by the Respondent, he was not asked why (or whether) he selected Bland for layoff.

When Pollack was called by the Respondent, he was asked nothing about how the June 20 layoff selections were made. On cross-examination Pollack testified that he was involved in about six layoffs when he worked for the Respondent, and: "Usually, when they [upper management] would give us a set amount, they would say this amount on days and this amount on nights." Pollack was asked about the June 20 day-shift selections for layoff, and he testified:

> Q. Who were the two employees that Mr. Parker, as you've stated—Mr. Parker decided would be laid off?
>
> A. Carlos Ordonez and Art Davenport.
>
> Q. And, in fact, Mr. Ordonez was not a rigger, isn't that true?
>
> A. No, he was a forklift operator.
>
> Q. Now, it was also your understanding—regarding the June 20th layoff, it was your understanding that the department had to lay off two riggers, isn't that true?
>
> A. It was my understanding that we had to lay off two people from my department, not necessarily.
>
> Q. So those two people could—I'm sorry, I'm sorry, I cut you off, what was your—
>
> A. Not necessarily two riggers.
>
> Q. And you had that understanding based on what?
>
> A. What I was told by Tyrone. . . . He said [that] we had to lay off two people.
>
> And basically I told him, you know, the last two that we hired in, that we brought in our department, Carlos and Art. It would be unfair to go to someone higher than those two, you know, someone that had been there longer and lay them off.
>
> Q. So your recommendation was that based on the seniority of the people in the department . . . the last two who were brought in, should be the ones who . . . were the ones who were laid off?
>
> A. Right.
>
> Q. And Mr. Parker accepted your recommendation, isn't that true?
>
> A. He agreed, yes.

Pollack further testified that during the previous layoffs in which he had been involved, he recommended laying off employees in terms of departmental seniority, and "usually" Parker accepted his recommendations. On cross-examination, Pollack was asked how long Anderson had worked as a rigger; Pollack replied: "I don't recall. Not very long. If I recall, if this is the one I'm thinking of, we moved him out to deck hand on a tugboat as a rigger and a deck hand on the tugboat and barge crane. And if I recall, he had a probationary problem and was called—taken to jail over a probation violation, if I remember correctly."

DeVega testified that she handled the recalls of employees from the June 20 layoff. Recalls were done on a departmental basis, and she would start calling employees when the department heads told her to do so. No riggers were recalled between June 20 and mid-October, but she did begin recalling welders during the first or second week of July. DeVega testified that she did not then recall Davenport from layoff: "Because he was a rigger."

Personnel Manager Zeringue testified that the Respondent recalled no riggers from June 20 through October 15. Zeringue testified, however, that although Davenport had been a member of the operations department, the Respondent's president, Russell, told him to recall Davenport as a welder. According to Zeringue:

> He said that the NLRB had told him that Mr. Davenport was upset that we hadn't called him back to work as a welder. . . . And that it might behoove us to call him back.

Zeringue thereafter called Overstreet who confirmed that he could use another welder. Then, on October 15, Zeringue called Davenport and offered him a job as a welder. (Again, Zeringue did not dispute in any significant respect Davenport's account of that call.) Zeringue further testified:

> A couple of days later, Mr. Russell informed me that there was a possibility there would be a layoff, and that it might be in Mr. Davenport's best interest if we informed him of that, so that he could make a decision as to whether he wanted to accept the job or not.

Zeringue then called Davenport again. Zeringue did not dispute Davenport's testimony of what was said in that second call.

Neither DeVega nor Zeringue disputed the testimony of crane operator Hart that, after the recalls began, the Respondent hired Holland as a rigger and it used employees of subcontractors, as well as employees of other departments, to perform the rigging work. The Respondent called Russell as its witness, but Russell was not asked anything about a recall of Davenport or whether the Respondent had actually come to anticipate another layoff shortly after October 15.

3. Davenport's case—credibility resolutions and conclusions

The complaint alleges that the Respondent discriminated against Davenport in violation of Section 8(a)(3) by three actions: (1) beginning on or about May 18, imposing on Davenport more onerous working conditions by (a) assigning Davenport to an isolated job and (b) assigning Davenport working hours that inhibited his contacts with other employees; (2) suspending Davenport for 2 days, June 14 and 15; and (3) laying him off on June 20 and thereafter refusing to recall him. The Respondent admits suspending Davenport, laying him off, and thereafter refusing to recall him, but it denies subjecting him to more onerous working conditions. Therefore, the first factual issue to be addressed is whether the Respondent subjected Davenport to more onerous working conditions beginning on or about May 18.

The Respondent assigned Davenport to onerous working conditions. Davenport testified that beginning about May 18 he was assigned to be a rigger on the barge crane and that thereafter he was assigned to that job "about 70 percent" of the time. Davenport further testified that being on the barge isolated him from all other work crews who were either on ships or land. Davenport, Parker and Pollack each testified that before May 18 the deck hand of the tug did the rigging that the barge crane required. Davenport further testified that after May 18 he did the rigging on the barge crane while the deck hand did nothing but sit and watch. Further, Davenport testified that, also beginning about May 18, he was ordered to take starting and quitting times that were different from the rest of the employees, mak-

ing it more difficult to have contact with other employees at shift changes.

It was Pollack who gave daily assignments to Davenport. After Davenport had testified that he had spent "about 70 percent" of his time working on the barge crane, Pollack was called by the Respondent and asked how much of Davenport's time was spent on the decks of ships, as opposed to the barge crane or elsewhere. Pollack testified, "Probably seventy percent." I do not believe that Pollack's venturing the same percentage was a mere coincident. Although witnesses were sequestered, it appears to me that Pollack tailored his testimony just to meet Davenport's testimony with the exact converse: Davenport spent 70 percent of his time on ship decks, not on the barge crane.[20] I credit Davenport over Pollack on this point; as well, I discredit Hart's testimony that Davenport worked as his rigger on land "most of the days, say for a month."

The Respondent offered no evidence to dispute Davenport's testimony that he was isolated from other employees by consistently being told to report to work earlier than other employees, or leave work later than other employees, or both. The Respondent argues that certain testimony by Davenport on cross-examination shows that, at least during the last week of his employment, Davenport was not required to report to work earlier than other employees. Davenport did testify that he was present to distribute handbills during the morning shift starts on June 16 through 20. That testimony, however, in no way detracts from Davenport's testimony that on all other days after May 18 he was required to start earlier or work later than other employees. As well as offering no parol evidence, the Respondent did not offer any of its records which would have shown just what Davenport's hours were after he was transferred to the operations department. I draw an adverse inference against the Respondent for its failure to present such documents, and I credit Davenport. That is, I find that, beginning on or about May 18, the Respondent subjected Davenport to more onerous working conditions by isolating him from other employees by assigning him to the barge crane and by assigning him to begin work earlier, or quit work later, than other employees. The analysis of Davenport's case therefore turns to the issue of whether the Respondent knew of Davenport's 1997 prounion sympathies before it began subjecting Davenport to these conditions.

Knowledge of Davenport's 1997 protected activities. The Respondent admits that it knew of Davenport's historic membership in the Boilermakers Union, but it denies that its supervisors had knowledge of his involvement with the Union's 1997 organizational attempt at any time before Davenport was assigned to the barge crane. Davenport and Union Representative Meredith testified that Davenport was elected chairman of the in-plant organizing committee on May 15. Meredith further testified that he was present on May 16 when Connatser faxed a letter to Lorton stating that 22 named employees were members of an in-plant organizing committee. I believe that testimony. Connatser's letter was addressed to the Respondent's owner George Lorton, and Lorton was presumably the first manager to see it. The Respondent, however, did not call Lorton to testify on the matter. Instead, the Respondent called only Russell who did not testify when it was that he first saw Connatser's letter; instead, Russell only offered that he "would imagine" that he received Connatser's letter on May 20. Even for this speculation Russell relied on the usual delivery time for the Respondent's *regular* mail. Of course, Connatser's letter was sent to Lorton by fax, not by regular mail. Moreover, the Respondent did not offer a copy of what Lorton received from Connatser; again, it offered only what counsel received from Russell. The copy that counsel received from Russell bore a fax date stamp that indicated when it had been sent (May 21); presumably the copy of the letter that Lorton received from Connatser bore a date stamp also. The Respondent, however, did not offer that copy. Instead, it withheld that copy, just as it withheld the testimony of the designated recipient of Connatser's letter, Lorton. I draw adverse inferences against the Respondent for its failure to produce Lorton and its failure to produce the original of the letter that it received from Connatser, and I find that the Respondent received Connatser's faxed letter on May 16.

Connatser's letter did not name Davenport as the chairman of the organizing committee, but the list of organizing committee members was not in alphabetical order and there was no other plausible reason for Connatser's having listed Davenport's name first. Upon receipt of Connatser's letter, therefore, the Respondent's supervision knew that Davenport was most actively involved in the 1997 organizational attempt, even if it did not know that Davenport had been elected "chairman" of the organizing committee. Finally on the point of just when the Respondent's supervisors became aware that Davenport was involved in the 1997 organizational attempt, it is to be noted that, even if the Respondent did not receive Connatser's letter by May 16, and even if it was not obvious to the Respondent why Davenport was listed first among the organizing committee members, Davenport credibly testified that on that date he began wearing three prounion buttons or stickers. Before May 16 Davenport wore only one Boilermakers Union sticker on his hardhat. Moreover, no other employee wore as many as three prounion insignia at once. I find that by virtue of Davenport's display of such insignia, as well as by the receipt of Connatser's letter, the Respondent had knowledge of Davenport's leading role in the organizational attempt as of May 16. The issue therefore becomes whether the Respondent bore animus against Davenport's 1997 protected activities.

The Respondent harbored animus against Davenport's protected activities. The Respondent relies on its having previously allowed Davenport to come and go from its employ when he got a job through the Boilermakers Union as a negation of any contention of animus in this case. It is true that the Respondent had allowed Davenport to come and go from its employ whenever jobs through the Boilermakers Union came available to him. Before 1997, however, Davenport had not participated in an organizational attempt while working for the Respondent. More importantly, Davenport's testimony about the threats that were allegedly made to him was impressive. Without any trace of memorization, Davenport gave clear and convincing recitations of what had been said, and he was not swayed or shaken by a rigorous cross-examination. The Respondent's witnesses, on the other hand, were quite unimpressive. Essentially, they did no more than respond negatively to generalized leading questions. (Most unimpressive was Martin who, as noted above, was willing to testify that the Respondent's days-off policy was adopted in April partially on the basis of a memo-

[20] On brief, the Respondent states that Pollack "testified that Davenport spent 60–70 percent of his time on the deck of a ship and most of the rest of this time on the dock." This statement is disappointing; at no point did Pollack suggest a percentage of "60" for anything; Pollack testified to no percentage other than 70, exactly the percentage to which Davenport had testified.

randum that was not created until at least some time in May.) For these reasons, and the better demeanor of Davenport, I find and conclude that, in violation of Section 8(a)(1): (1) Martin and Branson threatened Davenport with plant closure or plant removal; (2) Suchier threatened Davenport with unspecified reprisals; (3) Parker threatened Davenport with discharge; (4) Parker also threatened Davenport with a futility of collective-bargaining efforts; and (5) Pollack stated in Davenport's presence that Davenport was being laid off because of his union activities. All of these threats prove that the Respondent harbored animus against Davenport's support of the Union.

Acts of alleged discrimination, relevant knowledge and animus having been established, it must be concluded that the General Counsel has presented a prima facie case that the Respondent unlawfully discriminated against Davenport by assigning him more onerous working conditions, by suspending him, by laying him off and by refusing to recall him, as alleged in the complaint. Under *Wright Line*,[21] once General Counsel has presented such a prima facie case the burden shifts to Respondent to show that it would have taken adverse actions against the employee even absent his protected activities. Therefore, the Board must examine the defenses that the Respondent has presented.

The Respondent unlawfully imposed more onerous working conditions on Davenport by isolating him from other employees in two different ways: (1) The Respondent has presented no factual defense to the allegation that Davenport was unlawfully assigned more onerous working conditions by being required to report earlier or work later than other employees. The Respondent argues that Davenport's employee calendar shows that he worked long hours on many days while he was working in the welding department. This is true, but the issue is whether, after he transferred to the operations department, and after the Respondent found out about his leadership role in the Union's 1997 organizational drive, Davenport was required to work hours that other employees were not. Again, the Respondent possessed the records, which would have defeated Davenport's testimony on this point, if it had not been true. The Respondent, however, chose not to present that evidence. Under *Wright Line*, therefore, the Respondent has not shown that it would have required Davenport to work hours different from other employees even if he had not engaged in protected activities. I therefore find and conclude that, in violation of Section 8(a)(3), the Respondent imposed more onerous working conditions on Davenport by assigning him work hours that isolated him from other employees. (2) I have already rejected the Respondent's contention that Davenport was not further isolated by consistently assigning him to work on the barge crane. Accordingly, I must conclude that the Respondent has failed to show that, even absent his prounion sympathies, Davenport would have been so assigned to the barge crane. I therefore find and conclude that, in violation of Section 8(a)(3), the Respondent also imposed more onerous working conditions on Davenport by assigning him to work areas that isolated him from other employees.

The Respondent unlawfully suspended Davenport. It is undisputed that when Parker told Davenport that he must not come to work on June 14 and 15 he told Davenport that the reason was: "Jim Martin's got the safety deal now that if you work over twenty-one days straight, you have to have two days off." An issue in this case is whether such a days-off policy as Parker described to Davenport actually existed.

As demonstrated above, both before and after Davenport was suspended, 15 employees other than Davenport, on 21 occasions,[22] worked more than 21 days without taking 1 day off, much less two.[23] The Respondent offers no explanation of why 13 of those 15 other employees were allowed to work more than 21 consecutive days without taking a day off. The two employees for whom the Respondent did offer explanations were operations department crane operators, Mott and Erbil. Mott worked series of 28 and 32 consecutive days with only one day off in between; Erbil worked two series of working 27 days each with only 1 day off in between; then Erbil worked 26 consecutive days after taking only 1 more day off. Parker testified that he did not require Mott and Erbil to take days off after once[24] asking them if they were too tired to continue. Assuming that this was an explanation for one of Mott's two, and one of Erbil's three, series of working in excess of 21 consecutive days without a day off, it certainly is not an explanation for all five of those series. Assuming, however, that Parker asked Mott twice and Erbil three times if they were too tired to continue, he certainly did not testify that he asked Mott and Erbil each consecutive day past day 21 if they were too tired to continue working without a day (or two) off. (That is, Parker did not testify that he asked Mott after the twenty-first day of his first series if he was too tired, or after the twenty-second day of Mott's first series, or after the twenty-first and twenty-second days of Erbil's second series, and so on.) Finally on this point, Parker admitted that, at least at some point, he gave Mott and Erbil opportunities to argue that they were not too tired to work safely after their series of working consecutive days; Parker, however, afforded Davenport no such opportunity.

Therefore, the Respondent has offered only incompetent testimony to meet the General Counsel's contentions that Mott's and Erbil's cases show disparate treatment against Davenport. The Respondent has further offered no testimony to meet the General Counsel's contentions that the cases of the 13 other employees also show disparate treatment against Davenport. To use the extreme example, the Respondent offered no evidence of why employee Guido was allowed to work periods of 75 and 91 consecutive days (with only a 1-day separation between those periods), but Davenport was suspended because he had worked in excess of 21 consecutive days. This is the essence of discrimination.

It must further be found that, even when the 15 employees other than Davenport ultimately did take a day off, they did not do so because a days-off policy was being enforced. If any of those 15 employees had been required to take any time off because of a days-off policy, the Respondent assuredly would

[21] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

[22] It must be noted that, although there were 15 other employees whom the Respondent did not treat as it did Davenport, there were actually 21 instances of employees working more than 21 days without taking time off; 11 of the previously named employees had only one series of working in excess of 21 days without taking time off, but Engin and Guido each had three, and Mott and Jerome Parker each had two.

[23] Worsham and Johnson took off 2 days, but not until after they had worked 26 consecutive days. Mott took 2 days off, but only after working series of 28 and 32 consecutive days with no more than 1 day off.

[24] Mott explained, "At the time we were very busy." The reference to "the time" necessarily means that Mott was referring to one occasion.

have produced their supervisors to so testify. The Respondent contends that it kept no records of when employees were required to take time off under the days-off policy, but nothing prevented the Respondents from producing the foremen of the 15 other employees to testify that, when those other employees finally did take a day off, they did so because they were ordered to under the days-off policy. Specifically, not even Parker offered such testimony regarding Erbil and Mott. As noted, Erbil took one day off after his first series of working 27 consecutive days, 1 day off after his second series of working 27 consecutive days, and 1 day off after his series of working 26 consecutive days; also Mott took 1 day off after his series of working 28 consecutive days and 1 day off after his series of working 32 consecutive days. Parker however, did not testify that he ordered either Mott or Erbil to take any of those days off pursuant to the days-off policy. Obviously, the Respondent did not present such testimony because it could not.

I do not believe that the days-off policy ever existed. As well as a total lack enforcement of the purported rule against any employee except Davenport, the Respondent could not document the adoption of any such policy. The Respondent offered management safety meeting minutes from April 23, 1996, that indicate that its business consultant Murdock may have proposed some sort of days-off policy, and Martin testified that he agreed with that proposal. The minutes of Respondent's management safety meetings after that month occasionally mention problems with excessive overtime; however they do not suggest that a days-off policy was ever adopted because of excessive overtime or consecutive days worked. As noted, at one point Martin posited that the rule had been adopted on April 24, but he could not explain why documentation that he supposedly had gathered before that date referred to dates in May.

Parker also testified that the 21-day days-off policy was established before it was imposed on Davenport, and he testified that he had previously announced it to the employees under his supervision. Hart and Pollack were under Parker's supervision, and they testified for the Respondent, but neither was asked to corroborate Parker on this point. Also, Overstreet testified for the Respondent, but he also failed to corroborate Parker by testifying that he told his employees in the welding department about the days-off policy. I therefore discredit Parker, as well as Martin, and I find that the 21-day days-off policy never existed, except as a putative reason for suspending Davenport.

Finally, on brief the Respondent argues that after Davenport was suspended no other employee worked 40 days without at taking least 1 day off. This appears to be true, but neither Parker nor McMillan testified that Davenport was suspended because he had worked 40 consecutive days, and the argument appears to be nothing but the lawyer's creation. Moreover, Parker told Davenport that he was suspended because the Respondent had a policy against working over "21" consecutive days without a 2-day break, something that was simply not true, as the records and testimony (or lack of testimony) establish.

Accordingly, I find and conclude that the reason assigned for the June 14 suspension of Davenport was a pretext, that the Respondent has not shown that it would have suspended Davenport even absent his protected activities, and that by that suspension the Respondent violated Section 8(a)(3) of the Act.

The Respondent unlawfully laid off Davenport. The Respondent's position is that Foreman Parker selected Davenport for layoff and that he did so for nonviolative reasons. Acceptance of Parker's testimony, therefore, is critical to the defense. Parker's testimony, however, was shown to be false on several accounts:

(1) Parker testified that McMillan told him to lay off "two of my riggers" from the operations department. This testimony by Parker conflicts with that of Pollack who testified that: "Usually, when they [upper management] would give us a set amount [of employees to layoff], they would say this amount on days and this amount on nights." Parker's testimony further conflicts with Pollack's testimony that Parker told him on June 20 that: "[W]e had to lay off two people from my department, not necessarily—not necessarily two riggers." Parker's testimony on this point further conflicts with the testimony of McMillan who testified that he only told department heads such as Parker the numbers of employees to be laid off, not names or classifications. I find that McMillan told Parker to lay off two day-shift operations department employees, not two riggers; the specific point here, however, is that Parker was not a truthful witness.

(2) Parker further testified that Davenport was selected for layoff strictly on the basis of merit, not seniority. Davenport, however, testified without contradiction that Parker told him that he was being laid off only because he was "the low man on the totem pole." Davenport's testimony of what Parker told him is further corroborated by the undisputed fact that Pollack also told him that he was being laid off because he was "the newest guy into the department." Even further corroboration of Davenport's testimony is found in Pollack's testimony that in the past the Respondent had conducted layoffs by seniority, and that on June 20 he recommended to Parker that the layoff be conducted according to seniority, and that Parker accepted that recommendation. The substance of Parker's trial-time contention that Davenport was laid off on the basis of comparative merit will be addressed below; but for now it must be noted that Parker's testimony on the point conflicted with not only the undisputed fact of what he told Davenport, it conflicted with the testimony of the Respondent's witness Pollack.

(3) After Parker had testified that McMillan told him to lay off two riggers, he was asked why he laid off forklift operator Ordonez as well as Davenport and Bland. Parker replied: "Because I had to lay off in that department also." According to McMillan, according to the Respondent's records, and according to all other witnesses on the point, however, the forklift operator's job is also in the operations department; there is no "forklift department." Also, when asked why he had not considered tugboat deck hand Anderson for layoff, Parker testified, inter alia, "I wasn't told to lay off anyone in that department." Like the "forklift department," there is no such thing as the "tugboat department." The Respondent's records show, and all other witnesses on the point testified, that the tugboat employees were part of the operations department. Indeed, Respondent's records listed Anderson as a member of the operations department, and he was classified as a "rigger," just as Davenport was.

The Respondent offers no suggestion on brief of how Parker's testimony can be reconciled with the testimony of its other witnesses or the undisputed facts. It is apparent to me that the reason that Parker's testimony presents so many conflicts is that Parker was not the supervisor who selected Davenport for layoff. The supervisor who selected Davenport for layoff was Pollack, as the status/payroll change report that was signed by Pollack reflects. At best, Parker's involvement was only to receive McMillan's order to lay off two day-shift employees

(not two riggers), to pass that order along to Pollack, and to accept Pollack's recommendation to lay off Davenport. (Parker's passive involvement in the selection of Davenport for layoff explains his lapse of memory and his initial answer to the General Counsel: "I laid off two employees?" That is, when Parker took the witness stand, he had not remembered laying off any employees except Davenport; when he was reminded that he had laid off two employees, Parker concocted the lie that he was told to lay off "two of my riggers"; then, when Parker was reminded that he also had laid off forklift operator Ordonez, he concocted the lie that he was also told to lay off an employee in the "forklift department.")

Parker attempted to justify the selection of Davenport for layoff by claiming Anderson was "multi-talented" and that Davenport was not. Davenport, however, had at least some degree of multiple talents because Pollack had qualified Davenport to operate the forklift, something for which Parker was willing to give Davenport no credit. More importantly, Parker was completely incredible in his listing of Anderson's multiple talents. Above, I have quoted at length Parker's extensive recitation of Anderson's many alleged talents. The purpose of that long quotation is to show the extent of Parker's exaggeration which falls of its own weight. Parker would have the Board believe that Anderson could even operate the tugboat on his own (something that would, of course, require a Coast Guard license). Anderson, however, was classified merely as a "rigger-learner," and he was in the Respondent's next-to-lowest pay grade. The low pay grade to which the Respondent had relegated Anderson hardly bespeaks of a consideration of Anderson as "multi-talented," or particularly valuable on any account.[25] Moreover, Anderson learned his line-handling skills on the job (not the Coast Guard Academy or anywhere else). When asked if Davenport did not have the same skills, Parker admitted that he did not know because he had never given Davenport a chance to perform the line-handling. Finally on this point, Davenport was in the Respondent's highest nonsupervisory pay grade, and General Superintendent Lackman had described him as: "The type of person we need. Does not miss work. A+ in all." I therefore reject any contention that Davenport was selected for layoff because he did not have, or could not quickly learn, skills that were more valuable to the Respondent than the skills that Anderson possessed. I therefore find to be false Parker's testimony that it was on the basis of merit that he selected Davenport for layoff.

When Parker left it to Pollack to select the employees who would be laid off, Pollack selected Davenport and Ordonez, and Parker agreed. At trial, Pollack attempted to justify the selection by stating that the employees were selected according to seniority; this answer was false because Davenport had more seniority than either Ordonez or Anderson. (Again, Davenport was last hired on June 23, 1996, and Ordonez and Anderson were hired on May 19 and 22, 1997, respectively.)

All of which is to say that the witnesses whom the Respondent presented to meet the General Counsel's prima facie case gave false testimony. When false reasons are given for an action, logic compels the conclusion that the real reason lies elsewhere. I find that the real reason that the Respondent selected Davenport for layoff is found in what Pollack told Parker in the presence of Davenport; to wit*:* a desire to rid the Respondent of one of the "Union guys." Indeed, Davenport was the lead "Union guy," as the Respondent knew. At minimum, the Respondent has failed to show that it would have selected Davenport for layoff even absent his known protected activities. Accordingly, I conclude that the Respondent violated Section 8(a)(3) by laying off Davenport on June 20.

The Respondent has unlawfully refused to recall Davenport from layoff. Assuming that the Respondent needed no more riggers after June 20, it is undisputed the Respondent began recalling welders almost immediately after that date, and the Respondent's witnesses on the point admitted that the Respondent remained in constant need of welders thereafter.[26] Before Davenport was a rigger, he was, of course, a welder (and, again, a highly paid welder). The Respondent argues that Davenport was not recalled as a welder precisely because he had been a rigger. In point of fact, however, Zeringue did recall Davenport as a welder on October 15.[27] Zeringue testified that Russell ordered him to recall Davenport as a welder because the NLRB had reported that Davenport was "upset" about not being recalled. Even if Russell's order originated in some desire to avoid the processes of the NLRB, it belies any contention that Davenport's having last worked as a rigger somehow constituted an inflexible obstacle to the recall of Davenport as a welder.[28]

The assumption of the preceding paragraph, however, is false; the Respondent did need riggers after June 20. As the Respondent's witness Hart testified, the Respondent employed subcontractors to do some of the rigging. The Respondent also hired Holland as a rigger, and it used Pollack, crane operators and employees of other crafts to do the rigging that Davenport would have done, but for the unlawful discrimination against him. Finally, Anderson quit on July 11, Pollack quit on September 26, and Seither (again, a rigger) also quit at some time during the fall of 1997; nevertheless the Respondent did not recall Davenport. As mentioned, each crane needs two employees to operate, one being a rigger. The Respondent has at least four cranes operating most of the time (plus the barge crane), and it is apparent that it did anything it could to avoid recalling Davenport. It is further apparent that the Respondent refused to recall Davenport, as a rigger or as a welder, because of the unlawful animus found herein. I therefore find and conclude that, as well as unlawfully laying off Davenport, the Respondent refused to recall Davenport in violation of Section 8(a)(3).

[25] As well as Anderson's being lowly paid, there is no accounting of how he could have learned so much in the month that he was employed by the Respondent before the June 20 layoff (especially since, according to Pollack, Anderson lost some worktime due to his parole violation).

[26] On Br., p. 21, the Respondent states that the Charging Party's witness Rebman testified that the Respondent laid off welders and ship fitters in late October. This statement is false. Rebman testified only that subcontractors' employees were then laid off.

[27] Indeed, the Respondent also relies on this recall as evidence that it harbored no animus toward Davenport's protected activities.

[28] Of course, the Respondent withdrew the October 15 offer of recall immediately after Davenport indicated that he would accept it. In order to justify that withdrawal, Respondent was required to create the excuse of another anticipated layoff. That excuse was a pretext, as demonstrated by the fact that there was no subsequent layoff of welders (see fn. 26) and by the fact that Russell, who made the decision to withdraw the October 15 offer of recall, did not testify on the point. Indeed, the Respondent's withdrawal of the recall notice fortifies my conclusion that the Respondent still did not want "Union guy" Davenport back at the plant.

C. Alleged Unlawful Surveillance of Protected Activities

1. Watching and photographing handbilling at the Respondent's gate

17th Street in Tampa runs north-south. A portion of the Respondent's property faces east on 17th Street. That property is bounded on 17th Street by a 5-foot-high chain-link fence that has a 40-foot gate. Employees arriving by automobile park in public spaces outside the gate. As one proceeds west through the gate, there is a guard house immediately to the left. About 50 feet inside the gate, and to the right, is the Respondent's administration building. On the east side of the building (where 17th Street and the gate can be easily seen) is a covered area in which automobiles can be parked (the covered parking area).

Beginning on June 16 and continuing until the day of the June 30 Board election, the union representatives handbilled before the first shift which started at 7:30 a.m., and they handbilled at the 4 p.m. shift change. Union Representative Meredith testified that on June 16, during both rounds of handbilling that occurred that day, he observed the Respondent's president, Russell, standing in the covered parking area, watching the handbilling. Specifically, Meredith testified that between 7 and 7:10 a.m. on June 16 he saw Russell come to the covered parking area and watch the handbilling. Russell remained at the covered parking area, according to Meredith, until shortly after the 7:30 a.m. starting time. At the afternoon shift change, Russell returned to the covered parking area and watched the handbilling for 15 or 20 minutes.

Meredith further testified that on June 18 Russell again stood in the covered parking area and watched the handbilling "for probably 20 minutes." During most of that time McMillan stood with Russell and also watched the handbilling. Meredith testified that McMillan left the area before Russell, but Russell stayed in the area and finished a cigarette; then, according to Meredith, Russell went into the administration building.

Meredith further testified that on June 20, at the start of the first shift, he saw Russell stand in the covered parking area watching both the handbilling at the gate and activities in the public parking area along 17th Street. In the public parking area the Union had stationed a van which carried supplies and refreshments for those performing the handbilling. Russell stood at the covered parking area that morning, and smoked cigarettes, for about 20 minutes. Russell did the same thing during the shift change, but for only about 10 minutes. Meredith did not testify that any employees were in the immediate vicinity of the van on either occasion of Russell's being in the covered parking area on June 20.

Meredith further testified that on June 23 and 25 he again saw Russell in the covered parking area watching the handbilling and activity around the van in public parking area. Meredith further testified that on June 26 he again saw Russell and McMillan who were observing the handbilling from the covered parking area. At some point, Russell left the covered parking area and walked to the chain-link fence that runs along 17th Street. Once there, according to Meredith, Russell "had a camera and took a picture of the gate where the employees walk through, and also the [public] area where the van was parked at." At the time, Meredith was at the van; Meredith also had a camera, and he took a picture of Russell as Russell took a picture of the area of the van. (The photograph that Meredith took of Russell was received in evidence; in that picture Russell is seen holding a camera above the chain-link fence along 17th Street and apparently taking a photograph.) On cross-examination, Meredith admitted that on most, "if not all," of the occasions that he saw Russell in the covered parking area Russell was smoking a cigarette. Union Representative Michael Jeske testified that he participated in much of the handbilling that Meredith did. Jeske testified consistently with Meredith about seeing Russell watching the employees as they entered the gate during the handbilling.

Based on this testimony by Meredith and Jeske, the complaint, at paragraphs 6, 15(a), and 16, alleges that, by Russell and McMillan, the Respondent unlawfully conducted surveillance of employees who were engaged in union activities. Paragraph 15(b) of the complaint alleges that Russell unlawfully "engaged in surveillance by taking photographs of employees engaged in union activities."

Russell, however, credibly testified that he stood at the covered parking area only to smoke (something that he, a very heavy smoker, could not do inside the administration building). Russell further testified that he took photographs only after an employee complained to him that the Union was taking photographs. As will be discussed below, Wanda Dozier is a virulently antiunion employee, and she regularly handbilled against the Union at some of the same times that the Union conducted handbilling. Joanne Shoffstall is an office employee. Shoffstall testified that on the day that Russell took photographs, union representatives had first taken photographs of her accepting a handbill from Dozier. Shoffstall, being upset, went into the administration building and complained to Russell. This testimony by Shoffstall was credible. Russell then secured an office camera and took photographs of union representatives who were in the area, both at the gate and at the public parking area. The photographs that Russell took are in evidence. Dozier is the only employee who appears in the photographs that Russell took. There was no testimony by any witness that any other employees were in the gate area (or the public parking area) at the time that Russell was taking photographs.

The General Counsel heavily relies on *F. W. Woolworth Co.*, 310 NLRB 1197 (1993), for the proposition that an employer's photographing of employees who are engaged in protected activities violates Section 8(a)(1). In *Woolworth*, the employer conducted himself in such a fashion that employees knew that they were being photographed. The Board held that photographing employees violated Section 8(a)(1), "because such pictorial record-keeping tends to create fear among employees of future reprisals." In this case, as opposed to the facts of *Woolworth*, the only employee who could have known that Russell was taking photographs was Dozier, again a virulently anti-union employee who could have possessed no fear that the Respondent would take reprisals against her because of her protected activities. There is, therefore, no argument that Dozier could have been coerced by Russell's conduct. *Woolworth* further repeats the well established principle that, "an employer's mere observation of open, public union activity on or near its property does not constitute unlawful surveillance." Therefore, even if Russell had stationed himself in the covered parking area to observe the handbilling (rather than just to smoke), no violation of the Act was committed. Nor was any such violation committed by McMillan who did no more than join Russell in the covered parking area on two occasions and also observe the open and obvious handbilling activities. Accordingly, I shall recommend dismissal of paragraphs 6, 15(a) and (b), and 16 of the complaint. To the extent that these allegations are also objections, I shall also recommend that they

gations are also objections, I shall also recommend that they be overruled.

2. Watching employees approach the polling area

As one leaves the area of the administration building and gate, walking or driving west, one approaches the Respondent's main production building. The production building is irregularly shaped, but it suffices to say that it is a structure that is about 230 feet by 82 feet, the longer sides facing east and west, roughly parallel to 17th Street. (The east side of the building therefore faces 17th Street, and the west side of the building faces the Ybor Channel of Tampa Bay). Employees usually enter the production building on its west side where there are two entrances, an 18-foot-wide service door and an ordinary door to the lunchroom. The service door is located about the middle of the west side of the building; the lunchroom door is almost immediately next to it (to the north). On the west side of the production building, and running north and south of it, and extending west to the Ybor Channel, is a large production yard. On the far north side of the production yard is a 6-foot chain-link fence that has strands of barbed wire running above it.

The June 30 Board election was conducted from 3 to 5 p.m. in the employees' lunchroom. As is the usual procedure, the Board agent who was assigned to conduct the election also conducted a preelection conference of the parties and their observers. The preelection conference was also conducted in the lunchroom. Attending the preelection conference for the Union were Union Representatives Meredith, Jeske, Connatser, and Gordon Baxter; attending for the Respondent were McMillan, Russell, George Lorton, and Attorney Peter Zinober. Meredith testified that at the conclusion of the preelection conference he and the other union representatives left the area of the lunchroom and walked toward, and around, the northwest corner of the building and began walking east toward the gate. As he looked back, however, he saw that, although Zinober, Lorton, McMillan, and Russell were taking the same path as the union representatives, McMillan had stopped near the northwest corner of the building, about 70 feet from the lunch room door and had begun talking to two other men. Meredith testified that he and Jeske went to a point outside the chain-link fence that borders the north side of Respondent's property. Meredith testified that he noted to Jeske that it was then "twelve minutes after three" according to his watch, but McMillan was still standing outside the lunchroom, still talking to the other men. By that point, Zinober and Russell had walked close to the administration building (and out of sight of the lunchroom door). Meredith began taking pictures. Meredith testified that at one point he saw Zinober looking at him. Although he was too far away to hear what was being said, he saw Zinober point to McMillan and the men with him; then Russell left Zinober and approached McMillan and the men to whom he was talking. Then McMillan, Russell and one of the men walked toward Zinober (and out of sight of the lunchroom door). Meredith testified that it took him (and Jeske) about 7 minutes to reach their vantage point where they began taking pictures; and Meredith testified it was about 10 minutes thereafter that McMillan re-joined Zinober and Russell. Meredith testified that during the period that he observed McMillan near the production building, some employees in the production yard were walking toward the lunchroom door, within sight of McMillan; furthermore, McMillan waived two of those employees over to talk to him (and the men who were with him) before they went on to the lunchroom. Meredith used an ordinary 35 millimeter camera to take his pictures; he admitted on cross-examination that he was about 500 feet from McMillan when he did take them.

Jeske testified consistently with Meredith about leaving the employees' lunchroom on June 30 with Meredith and seeing McMillan talking to other persons; Jeske identified one of the persons with whom McMillan stood near the northwest corner of the production building as the Respondent's general manager, Wayne Reed. (Jeske further testified that Reed had been with Zinober and other management members at the preelection conference.) Jeske further testified that, until McMillan was approached by Russell, McMillan stood where he would have a clear view of the door to the lunchroom. Jeske estimated the amount of time that McMillan's group stood in that position to be from 10 to 15 minutes. Jeske estimated that during that period four or five employees passed McMillan's group on their way to the area of the lunchroom; some of the employees stopped and spoke "a few minutes" with McMillan's group. Jeske concluded that when McMillan's group was standing near the northwest corner of the production building: "There was no way that anybody could have entered the polling area without being seen from where they were standing." On cross-examination, Jeske admitted that the employees whom he saw walking by McMillan's group could have been supervisors or employees of subcontractors, although all of them did start walking toward the lunchroom area after they spoke to McMillan's group.

Until he was laid off on June 20, Matthew Wilson was a welder under Foreman Overstreet; one Dale England is a leadman of the welding department. Wilson testified that about 4 p.m. on June 30 he returned to the plant to vote in the Board election. As he walked toward the polling area he saw Overstreet and England standing in the production yard, "talking to each other." Wilson testified that Overstreet and England were about 75 feet from the lunchroom door; Wilson passed within 10 feet of them. Wilson proceeded into the lunchroom to vote; when he came out, Overstreet and England were in the same place, still talking. Wilson estimated the elapsed time that Overstreet and England would have been standing and talking in the production yard as "about 10 minutes."

Based on this testimony by Wilson, Meredith and Jeske, the complaint, at paragraphs 17 and 18, alleges that by McMillan's and Overstreet's conduct the Respondent conducted unlawful surveillance of the employees as they engaged in the protected activity of voting in the Board election of June 30.

On the day of the Board election there was in the production yard, several feet west of the door to the lunchroom, a containerized-freight container (a trailer without undercarriage), which was called the "Conex Trailer" at the hearing. The Conex Trailer is 40 feet long, 8 feet deep, and 8 feet high. Just west of the Conex Trailer was a large crane.

McMillan testified that when he left the preelection conference he was accompanied by Reed. McMillan and Reed walked west into the production yard and turned north around the Conex Trailer and crane where they met Overstreet. Overstreet stopped McMillan (and Reed) and asked a question about production. When the conversation with Overstreet had lasted from "three to five minutes," Russell approached the three men and told them that someone (Meredith) was taking their picture. At that point McMillan and Reed (and Russell) walked east, directly toward the administration building. Overstreet either stayed in that working area or went to his office, which was in the immediate vicinity. McMillan estimated that he stopped the

conversation with Overstreet by 3:08 p.m. McMillan testified that during the conversation with Overstreet, the Conex Trailer and the crane were between him and the lunchroom door which was 125 feet away. McMillan acknowledged that he could see many employees working, but he flatly denied that he could see the lunchroom door.

I credit Meredith's testimony that he observed McMillan's group until about 3:20 p.m., but I credit all other testimony by McMillan. That is, at the time that he was observed by Meredith and Jeske, McMillan was doing nothing more than discussing a production matter with a supervisor whom he met in the working area as he left the polling area. Moreover, I find that McMillan could not see the lunchroom door at the time. The Conex Trailer and crane are clearly seen in some of the photographs that Meredith took.[29] Although Meredith and Jeske possibly could not tell it from 500 feet away, it is apparent that the trailer and crane would have presented formidable obstacles to anyone who wanted to view the lunchroom door when standing anywhere near where McMillan was. McMillan did speak to some individuals as they walked in the area, but there is no probative evidence that those individuals were employees of the Respondent (as opposed to employees of subcontractors or supervisors); assuming that they were the Respondent's employees, and assuming that they were on their way to vote (as opposed to being on their way to the service door to the west side of the building), there is no evidence McMillan engaged in any electioneering. Finally, Overstreet credibly testified that his activities that Wilson witnessed about 4 p.m. on June 30 were nothing more than an instance of normal shift-change exchanges of information.

Under these circumstances I find that the Respondent did not conduct surveillance of the polling area, and I further find that no employee who saw the supervisors in question would have reasonably believe that the Respondent was conducting such surveillance.[30] I shall therefore recommend dismissal of paragraphs 17 and 18 of the complaint. To the extent that these allegations are also objections, I shall also recommend that they be overruled.

D. Other Conduct Alleged to Have Been Objectionable

The Union has filed objections over each of the unfair labor practices that I have found above; I recommend that the Board sustain those objections. The Union has also filed objections over each of the unfair labor practice allegations that I have dismissed above; I recommend dismissal of those objections. Additional objections that were filed by the Union are:

> 1. Employees prepared and distributed anti-union literature while paid and on the clock.
>
> 2. The Employer supplied materials, supplies, and equipment, free of charge, for employees to produce and distribute anti-union literature.
>
> 3. The Employer aided, assisted, and discriminated in favor of employee groups which opposed the Union, and did not give similar aid, assistance or benefits to Union supporters who sought to persuade employees to vote for the Union.
>
> . . . .
>
> 9. The Employer distributed "Employee Fact Sheets" during the election campaign which threatened employees with job loss, replacement in the event of a strike, closure of the Company if the Union won the election, loss of wages, benefits, and erosion of working conditions if the Union won the election, improved working conditions if the Union was defeated, and suggested that it was futile to vote for union representation.
>
> . . . .
>
> 12. At various dates . . . the Employer . . . interrogated employees concerning their union activities.
>
> 13. During the election campaign, the Employer promised improvements in terms and conditions of employment if the Union was defeated.
>
> 14. The day after the election, the Employer followed through on its promise to reward employees if the Union was defeated by granting employees eight hours of paid leave.

(Again, none of these quoted objections was alleged by the complaint as a separate unfair labor practice.)

Interrogating employees. Davenport testified that Martin demanded to know about the Union's organizational attempt and Davenport's role in it. I found that testimony credible, and I sustain the Union's objection in this regard.

Assisting employees who opposed the Union. At the hearing the Union contended that the Employer allowed antiunion employees Dozier and Keith Parker to print antiunion literature on working time and allowed them to use the Employer's facilities and supplies to do so; the Union further contended that the Employer allowed Dozier and Parker to use working time to distribute such literature. There is a timeclock at the gate; Meredith testified that other representatives of the Union, but not he,[31] saw Dozier punch out, pass out handbills during what would be working time, and then punch back in. Dozier was called by the Respondent; she testified that supervisors warned her against using the Employer's facilities for production of handbills, and she testified that she did not do so. Dozier further testified that supervisors warned her against conducting distributions on working time, and she testified that she did not do so. Parker did not testify.

The Union adduced no evidence that any supervisor ever permitted (or even knew of) either: (1) productions of antiunion literature on working time, (2) productions that were accomplished with the use of the Employer's supplies or facilities, or (3) employee distributions of anti-union handbills during working time. I find Meredith's hearsay observations, and his many assumptions, are not overcome by Dozier's testimony. In this posture of the case, I necessarily find that the objections in this regard are not supported by probative evidence. I shall therefore recommend their dismissal.

Other objections. The "Fact Sheets" to which the Union refers in its objections are in evidence, but they contain none of the coercive statements that the Union alleges. Moreover, the Union offered no evidence of any unlawful promises made by the Employer, and the grant of 8 hours' leave was announced

[29] McMillan's group, and the northeast corner of the Conex Trailer, show in Meredith's photographs that were reproduced on the R. Exh. 6(a). A full view of the trailer, and its relationship to the production building are shown in R. Exh. 6(g).

[30] All of the cases cited by the General Counsel involve systematic employer conduct from which employees could not have escaped impressions of surveillance.

[31] As Meredith admitted: "I, myself, did not witness her. Other members of the Metal Trades Council did."

after the election was completed and therefore not within the "critical period" for objections.[32]

CONCLUSIONS OF LAW

1. By the following acts and conduct Respondent has violated Section 8(a)(1) of the Act:

(a) On or about May 17 or 18, Martin threatened the Respondent's employees with plant closure and relocation if they chose to be represented by the Union.

(b) On or about May 17 or 18, Branson threatened the Respondent's employees with plant closure and relocation if they chose to be represented by the Union.

(c) On or about May 20, Sucher threatened the Respondent's employees with unspecified reprisals because they engaged in union activities.

(d) On or about May 20, Parker threatened the Respondent's employees with discharge because they engaged in union activities.

(e) On or about May 20, Parker warned the Respondent's employees that it would be futile for them to choose to be represented by the Union.

(f) On or about June 20, Pollack threatened the Respondent's employees with discharge because they had engaged in union activities.

2. By the following acts and conduct Respondent has violated Section 8(a)(3) and (1) of the Act:

(a) On or about May 18, assigning to employee Arthur Davenport more onerous working conditions because he had become or remained a member of the Union or had given assistance or support to it.

(b) On or about June 14, suspending employee Arthur Davenport because he had become or remained a member of the Union or had given assistance or support to it.

(c) On or about June 23, laying off employee Arthur Davenport because he had become or remained a member of the Union or had given assistance or support to it.

(d) Since on or about June 23, refusing to recall from layoff employee Arthur Davenport because he had become or remained a member of the Union or had given assistance or support to it.

THE REMEDY

The Respondent having discriminatorily laid off and refused to recall employee Arthur Davenport, must offer him reinstatement and make him whole for any loss of earnings and other benefits, computed on a quarterly basis from the date of his layoff to the date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). The Respondent shall similarly make Davenport whole for the loss of pay or other benefits that he suffered as a result of its unlawfully suspending him. Respondent shall also be ordered to expunge from its files all records of the violative discriminatory treatment of Davenport. *Sterling Sugars, Inc.*, 261 NLRB 472 (1982). Finally, Respondent shall be required to post a notice that assures the employees that it will respect their rights under the Act.

[Recommended Order omitted from publication.]

[32] See *Ideal Electric Co.*, 134 NLRB 1275 (1961).